U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: October 7, 1998
Case No.: **98 INA 119**

In the Matter of:

INSTANT TRAVEL SERVICE, INC.,
Employer,

on behalf of

RUYA SUNAL,
Alien.

Appearance: G. A. Verdin, Esq., of Los Angeles, California, for the Employer and Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of RUYA SUNAL ("Alien") by INSTANT TRAVEL SERVICE, INC., (the "Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On April 30, 1996, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Manager, Travel Agent" for this "International Travel Business." AF 140. The position was classified as a "Manager, Travel Agency," under Occupational Code No. 187.167-158[3] of the DOT.[4] The Employer described the job duties as follows:

> Oversee operations of travel agency. Train new personnel. Keep employee records. Plan itineraries and arrange accommodations and other travel services for customers of travel agency. Converse with customer to determine destination, mode of transportation, travel dates, financial considerations, and accommodations required. Provide customer with brochures and publications containing travel information. Compute cost of travel and accommodations. Book transportation, hotel reservations, and tickets. Print or request transportation carrier tickets using computer printer system or system link to travel carrier. Collect payment for payment for transportation and accommodations from customer. Plan, describe, arrange and sell itinerary tour packages and promotional travel incentives.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]187.167-158 **MANAGER, TRAVEL AGENCY** (business ser.; retail trade) Manages travel agency: Directs, coordinates, and participates in merchandising travel agency services, such as sale of transportation company carrier tickets, packaged or specialized tours, or vacation packages. Plans work schedules for employees. Trains employees in advising customers on current traveling conditions, planning customer travel and itineraries, ticketing and booking functions, and in calculating costs for transportation and accommodations from current transportation schedules and tariff books and accommodation rate books. Sells travel tickets, packaged and specialized tours, and advises customers on travel plans. Reviews employee ticketing and sales activities to ensure cost calculations, booking and transportation scheduling are in accordance with current transportation carrier schedules, tariff rates, and regulations and that charges are made for accommodations. Reconciles sales slips and cash daily. Coordinates sales promotion activities, approves advertising copy, and travel display work. Keeps employee records and hires and discharges employees. *GOE: 11.11.04 STRENGTH: L GED: R4 M4 SVP: 7 DLU:77*

[4]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

AF 140 at Item 13. (Copied verbatim without change or correction.) The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was high school completion. The experience requirement was two years in the Job Offered or two years in the Related Occupation of Travel Agent. The Other Special Requirements were

> Must speak Turkish as will be dealing with Turkish speaking clientele and business associates. Percentage of language required: 50% - Oral.

Id., at Items 14 and 15. The hours were 9:00 to 6:00 in a forty hour week at $1,700 per month with no overtime. The worker would supervise three employees.[5]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated August 1, 1997. AF 104. Citing 20 CFR § 656.21(b)(2)(i)(C), the CO found that the Employer had failed to offer sufficient evidence to justify its special job requirement of fluency in the Turkish language.[6]
The NOF then described the proof that the Employer was required to file in rebuttal. AF 105-106.

Rebuttal. The Employer's September 12, 1997, rebuttal consisted of an argument by counsel,[7] a statement by its President, and supporting documents. AF 84-100. Employer's president asserted that 30 to 35% of its clients cannot communicate in the English language. Up to this point the Employer's President, who apparently speaks Turkish, has handled the customers who require service by a person who is fluent in that language. "However, he said, "due to the growth of the business, it is now necessary to have an individual on a full time basis who will be able to assist the Turkish speaking clients." He then asserted, "The job has been in existence and [was] not created for the alien." AF 92.

Final Determination. On September 22, 1997, the CO denied certification in the Final Determination. AF 80-83. Referring to the NOF finding that its special foreign language requirement was unduly restrictive under 20 CFR § 656.21(B)(2) because that this occupation

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[5]The Alien, a national of Turkey, completed high school in Turkey in 1985. All of her work experience was in Turkey. She worked as a Travel Agent in a Travel Agency from the end of 1988 to the beginning of 1990. She then was a "Manager, Travel Agent" in a travel agency from August 1992 to June 1993. There is a discrepancy in the record. Her application said that from June 1993 to September 1994 she was a manager in a supermarket chain; it further said that she was a Manager, Travel Agent in a Travel Agency from September 1994 to July 1995. On July 11, 1996, however, she notified the SESA that she had been unemployed from 1993 to the date of that letter. AF 143-144.

[6] 20 CFR § 656.21(b)(2) provides: "The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: (i) The job opportunity's requirements, unless adequately documented as arising from business necessity ... (C) Shall not include requirements for a language other than English."

[7] Assertions by an employer's attorney that are not supported by underlying statements by person with knowledge of the facts do not constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991); **Mr. and Mrs. Elias Ruiz**, 90 INA 425 (Dec. 9, 1991); **Personnel Services, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr. Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990).

normally does not require a foreign language, the CO explained that including this special skill as a job requirement was a violation of 20 CFR § 656.21(B)(2)(i)(C) unless Employer proved the foreign language to be a customary requirement for the occupation in the United States or that it was a business necessity.

After reviewing the evidence available at the time of the NOF, the CO discussed the rebuttal evidence Employer was told to furnish, and addressed the rebuttal statement by the Employer, finally concluding that the rebuttal was not accepted. First, the CO said, Employer had failed to provide the total number of clients served and explained how the Employer's statement failed to respond to the NOF in this regard. Despite Employer's repeated assertions of percentages of its clientele who did not speak English, the CO said the lists of purported customers and other data in the rebuttal exhibits failed to disclose sufficient information from which to compute the total number of customers and the total number of its customers who could only speak Turkish. Such analysis was further complicated by Employer's assertions that sizeable groups of its customers could not speak English and required service by various employees who could converse in Spanish, French, and other European languages.

Assuming the proportion of its customers who Employer claimed spoke only Turkish, the CO said the Employer should have been able to provide samples of the Turkish language brochures, flyers, itineraries, promotional and sales materials, and invoices it used to comply with the NOF request for documentation. The CO added that, "Since you have represented that a significant portion of your business comes from Turkish speaking contacts and clients, it does not make sense that you would translate every brochure and advertisement for every single inquiry that you receive from the sources that you listed." The CO further commented, "... [G]iven the presentation you make as to the proportion of your business these clients represent, it makes no sense that every bit of information is verbally translated and that you have no printed material in Turkish." In summary, the CO said that the eight pages of client names Employer had submitted in the rebuttal did not provide the necessary documentation, explaining, "Simply providing names of clients does not document whether or not the clients speak English, only Turkish and/or some other language." The CO then concluded,"You have provided no documentation or specific information in the impact on your business that would be caused by the absence of the language." As the Employer failed to sustain its burden of proof, the CO denied certification on grounds that the Employer failed to rebut the finding in the NOF under 20 CFR § 656.21(b)(2) that the job description contained a foreign language requirement that was not supported by proof of business necessity.

Appeal. Following the denial of certification, on October 24, 1997, the Employer requested review of the Final Determination. AF 01-79. It submitted a brief on December 24, 1997. It is significant that the Employer's brief contradicted its rebuttal argument on business necessity by admitting that the Employer did employ Turkish speaking travel agents and that it routinely hired Turkish speaking translators and "hostesses" to meet the convenience and needs of its clients. Brief, pp. 02-03. The Employer's brief included several pages of new evidence that was not submitted as part of its rebuttal. As the attachments Employer included as part of its

brief contained evidence that was not in the record before the CO, the evidence is not a part of the Appellate File that the panel may consider under 20 CFR § 656.26(b)(4). **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar. 13, 1989); also see **Modular Container Systems, Inc.**, 89 INA 228 (Jul. 16, 1991)(*en banc*); **Yaron Development Co.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).[8]

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This may be demonstrated with proof as to (1) the customers, co-workers, or contractors who speak the foreign language and (2) the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers'

[8] This is consistent with the well-established holding that evidence first submitted with the request for review will not be considered by the Board. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

use of that foreign language and the job to be performed.[9]

Burden of proof. Alien labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived need for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, such as this Employer:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[10]

Because the Employer's application seeks an exception to the Act's broad limits on immigration into the United States, the Panel will apply the Act and regulations to the Alien's entitlement to labor certification under the well-established principle that statutes granting exemptions from their general operation must be strictly construed, and that any doubt must be resolved against the party invoking such an exemption from a statute's general operation. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). It follows that in pursuing alien labor certification, the applicable law required that the Employer and not the CO must carry the burden of proof as to all of the issues arising under this application for relief pursuant to the Act and regulations.

Final Determination. The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for a Travel Agency Manager fluent in the Turkish language turned entirely on the proof of the facts that the CO described in the NOF. After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the Employer's proof is vague, incomplete, and limited to Employer's bare assertions, which it failed to support with relevant objective facts. **Analysts**

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[9]In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

[10]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

International Corporation, 90 INA 387 (Jul. 30, 1991).[11]

In denying certification, the CO said at AF 05 the Employer did not prove that a Travel Agency Manager who was not fluent in Turkish could not perform the basic job duties of this position or that the Employer's preference for a Turkish speaking Travel Agency Manager could not be met by other methods. Moreover, the Employer did not show that the Turkish language was used for a substantial proportion of the time and functions of the Travel Agency Manager on this job. Specifically, the Employer failed to prove that fluency in Turkish was vital to the work discussed in the DOT job description of the job duties of this position or was a necessary part of communications with Employer's correspondents and customers. In addition, the Employer's statement and brief admitted that it routinely hired travel agents and other subordinate personnel who spoke Turkish, and that the President of the Employer historically performed the duties of the Travel Agency Manager prior to the filing of this application and that he, too, was conversant in the Turkish language. To the extent that the Employer relied on the prospective unavailability of its President to fill the need it asserted as a "business necessity," the Employer also failed to sustain its burden of proving that such a change in conditions had occurred as required him to cease to fill the need that the Employer thus perceived. Consequently, the Employer's admissions in its rebuttal and brief persuasively support the CO's finding that the Employer's preference for a Turkish speaking Travel Agency Manager could be met by other methods.

Summary. Although the Employer ostensibly complied with the NOF directions to file evidence supporting its position on the issues raised in this case, the facts sought were not proven by the Employer's assertions were limited to general statements that appeared unconnected with tangible data. Moreover, the Employer's proof failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions with business customers that was sufficient to affect the performance of the Travel Agency Manager's duties. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). At best, the Employer has shown that fluency in Turkish meets the convenience of the Employer's prospective customers, to whom English is a second language. While some of the people whose business the Employer seeks may be "more comfortable" in dealing with a bilingual Travel Agency Manager, this is insufficient to support a finding of the business necessity for a foreign language requirement. **Weidner's Corp.**, 88 INA 097 (Nov. 3, 1988)(*en banc*).

It follows that the Appellate File supported the conclusion of the CO that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language stated

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[11] Any written statements of the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer has supplied in lieu of independent documentation, but in considering them must give Employer's statements the weight they rationally deserve. The bare assertions that Employer's statements offered without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*). To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

in Employer's application. Consequently, the CO's denial of alien labor certification was supported by the evidence of record and should be affirmed. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.